

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE  
SUBSTANTIAL DEVELOPMENT AND  
VARIANCE PERMIT GRANTED BY  
PIERCE COUNTY TO JOHN and  
SUZANNE SIMCHUK and DISAPPROVED  
BY THE STATE DEPARTMENT OF  
ECOLOGY,

JOHN and SUZANNE SIMCHUK and  
PIERCE COUNTY,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT  
OF ECOLOGY, ALAN and BEVERLEY  
STOLTENBERG, LEROY and MAXINE  
WALKER, and ARTHUR R. and ANNA  
MAE PAULSEN,

Respondents.

SHB No. 84-64

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, a request for review of the disapproval by the State Department of Ecology of a shoreline variance granted by Pierce County to John and Suzanne Simchuk, came on for hearing before the Shorelines

Hearings Board, Lawrence J. Faulk, Chairman, and Wick Dufford, Rodney M. Kerslake, Nancy Burnett and Cynthia Sullivan, Members, convened on Fox Island, on March 28, 1985. Administrative Appeals Judge William A. Harrison presided.

Appellants John and Suzanne Simchuk appeared by their attorney, Patricia T. Lantz. Appellant Pierce County did not appear. Respondent State of Washington Department of Ecology appeared by Jay J. Manning, Assistant Attorney General. Respondents Alan and Beverly Stoltenberg, Leroy and Maxine Walker and Arthur R. and Anna Mae Paulsen appeared by their attorney, Ronald E. Culpepper. Reporter Gene Barker provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

#### FINDINGS OF FACT

##### I

This matter arises on Fox Island in Pierce County.

##### II

Mr. and Mrs. Simchuck reside on the western shore of Fox Island. Their lot is high bank waterfront. Their home is located at the top of the bank some 90 feet above the beach. An electric tram runs down the bank to a deck which is at the base, yet above the ordinary high water line. There will be a private boat launch ramp adjacent to the deck.

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
SHB No. 84-64

1 III

2 To the north of the Simchuck's are the lots belonging to the  
3 Stoltenbergs, Paulsens and Walkers. These were also high bank lots  
4 but were cut and filled to create a bench about 15 feet above the  
5 beach. This bench supports a house on each lot, and each was built  
6 before the Shoreline Management Act of 1971, chapter 90.58 RCW.

7 IV

8 To the south of Simchucks' are high bank lots similar to theirs.  
9 High bank waterfront is the norm on the western shore of Fox Island.

10 V

11 Mr. and Mrs. Simchuck propose to construct a beach cabana on the  
12 deck at the base of their bank or bluff. As originally designed and  
13 proposed, it was to be 20 feet by 14 feet and 21 feet high. All  
14 parties have stipulated that the proposal has been reduced in height  
15 to 15 feet. Exhibit A-1. The purpose of the cabana is to store deck  
16 furniture, boating equipment, picnic supplies and other sporting  
17 gear. A further purpose is to provide shelter from the weather for  
18 the owners and their guests.

19 VI

20 The cabana would have neither running water nor toilet. It is  
21 uncertain whether these are required, or not, by the building code.

22 VII

23 The site of the proposed cabana is designated "conservancy" by the  
24 Pierce County Shoreline Master Program (PCSMP).

25  
26  
27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
SHB No. 84-64

VIII

The proposed cabana is a residential accessory use.

IX

The proposed cabana is subject to a setback of 50 feet from the ordinary high water line. PCSMP section 65.62.050.

X

The proposed cabana would be situated within the subject setback.

XI

On December 11, 1983, Mr. and Mrs. Simchuck applied to Pierce County for a shoreline substantial development and variance permit. The Pierce County planning staff recommended denial. The Pierce County Hearing Examiner denied. The Pierce County Council, on appeal, adopted a resolution approving the Simchuck's application.

XII

From this, the Stoltenbergs, Paulsens and Walkers requested review by this Board. Thereafter, the State Department of Ecology (DOE) disapproved the variance. The Simchucks' requested review of DOE's disapproval on March 19, 1985. The Stoltenbergs, Paulsens and Walkers moved, and were permitted, to intervene.

XIII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

I

We first turn to a matter of jurisdiction. When appearances of

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
SHB No. 84-64

1 counsel were called for at the hearing in this matter, Pierce County  
2 did not appear. However, an employee of Pierce County who was present  
3 in the capacity of a witness for the State Department of Ecology  
4 declared, at that time, that Pierce County is not a party to this  
5 request for review. A witness who is employed by Pierce County is not  
6 its representative in these proceedings. See WAC 461-08-030 calling  
7 for entry of a formal appearance. Moreover, both the request for  
8 review filed by Stoltenberg, et al. and the request for review filed  
9 by Simchuck named Pierre County. The file herein contains attachments  
10 to each request for review showing service upon Pierce County, thus  
11 making it a party to these proceedings. Pierce County has not raised  
12 any defense, by motion or pleading, of lack of jurisdiction over the  
13 person or insufficiency of process or service of process. These are  
14 now waived. WAC 461-08-010 and CR 12(h)(1)(B). Pierce County has, by  
15 its legal counsel, signed and joined in presenting a stipulation  
16 acknowledging itself as a party in this matter. For clarification's  
17 sake, we conclude that we have jurisdiction over the parties, of which  
18 Pierce County is one, and that it is therefore bound by the Order  
19 herein even though electing not to appear at hearing.

## 20 II

21 A variance is required for the proposed cabana because it is  
22 otherwise inconsistent with the 50 foot setback required by PCSMP  
23 section 65.62.050.

## 24 III

25 Variances are allowed under criteria found both in the master

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER  
SHB No. 84-64

1 program at PCSMP section 55.72.020 and DOE rules at WAC 173-14-150.  
2 These implement RCW 90.58.100(5).

3 IV

4 The relation between the two variance provisions is stated at WAC  
5 173-14-155:

6 Pursuant to RCW 90.58.100(5) and 90.58.140(3), the criteria  
7 contained in WAC 173-14-140 and 173-14-150 for shoreline  
8 conditional use and variance permits shall constitute the  
9 minimum criteria for review of these permits by local  
10 government and the department. Local government and the  
department may, in addition, apply the more restrictive  
criteria where it exists in approved and adopted master  
programs. (Emphasrs added).

11 In this case, the Pierce County Hearing Examiner applied the  
12 master program variance provision. The DOE, conducting its review of  
13 the variance under RCW 90.58.140(12), applied the variance provision  
14 of its rules. The DOE cites the word "may" in WAC 173-14-155 in  
15 support of its choice of the DOE criteria even though the master  
16 program criteria is more stringent, as will be established hereafter.  
17 We disagree with DOE's choice of its own rules for variance where more  
18 restrictive criteria exist in approved and adopted master programs.  
19 The coordination rule adopted by DOE at WAC 173-14-155, above, does  
20 not alter the statutory requirement that all developments be  
21 consistent with adopted and approved master programs. RCW  
22 90.58.140(1) and (2). This requirement includes consistency with the  
23 variance provisions of master programs. We construe the last sentence  
24 of WAC 173-14-155 above to mean that more stringent variance criteria  
25 may be applied if part of an approved master program and may not be

6 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER  
SHB No. 84-64

applied otherwise. Once part of an approved master program, variance provisions more stringent than those of DOE's rules must be applied until amended or repealed by local government and approved by DOE under the procedure of RCW 90.58.190.

V

The approved and adopted master program (PCSMP) does contain a more restrictive criteria than the minimum criteria of the DOE. This is because the PCSMP criteria, unlike the DOE criteria, requires the applicant to carry a heavy threshold burden of proving that without a variance, he cannot make any reasonable use of his property. Accord, Green v. Bremerton, SHB No. 81-37 (1982) and Pier 67, Inc. v. Seattle and DOE, SHB No. 81-13 (1981). The applicants here have reasonable use of their property without construction of a cabana within the applicable setback from salt water. The proposed development is therefore inconsistent with the master program variance criteria, PCSMP section 65.72.020.

VI

The proposed development is also inconsistent with the master program variance criteria, PCSMP section 65.72.020E. which requires an applicant to show:

That the specific provision or provisions to be relaxed clearly did not foresee or consider the particular situation the applicant is facing. (Emphasis added).

The situation which the applicants are facing is not particular to them. Rather, it is the widespread situation of high bank ownership in their locale. The setback provision cannot be relaxed without

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
SHB No. 84-64

1 precipitating similar structures along the foot of the bluff. That is  
2 the situation both foreseen and prevented by the master program  
3 setback provision.

#### 4 VII

5 The proposed development is also inconsistent with the master  
6 program variance criteria, PCSMP section 65.72.020B. which requires an  
7 applicant to show:

8 That granting a variance will not violate, abrogate, or  
9 ignore the goals, policies, or individual environment  
purposes spelled out in the Master Program.

10 The master program policies for the conservancy environment are:

- 11 1. Areas should maintain their existing character.
- 12 2. Developments which do not consume the natural physical  
13 resource base should be encouraged.
- 14 3. Substantial and non-substantial developments which do not lead  
15 to significant alterations of the existing natural character of an  
16 area should be encouraged.

17 The proposed cabana would not maintain the existing natural  
18 character of the site. More importantly, it would set a precedent  
19 which could significantly alter the existing natural character of the  
20 shore of Fox Island through the cumulative impact of other such  
21 cabanas.

#### 22 VIII

23 The proposed cabana is inconsistent with the variance provisions  
24 of the PCSMP and Department of Ecology's disapproval of it should be  
25 affirmed.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER  
SHB No. 94-64



IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

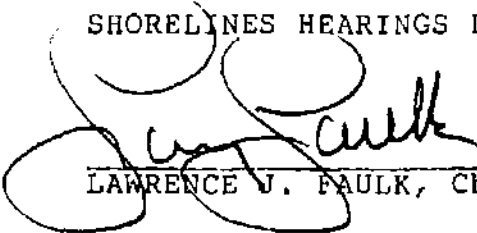
FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
SHB No. 84-64


ORDER

The State Department of Ecology's disapproval of the shoreline variance granted by Pierce County to Mr. and Mrs. John Simchuck is hereby affirmed.

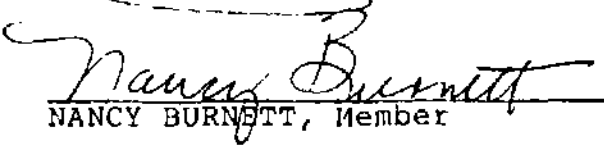
DONE at Lacey, Washington this 25th day of April, 1985.


SHORELINES HEARINGS BOARD

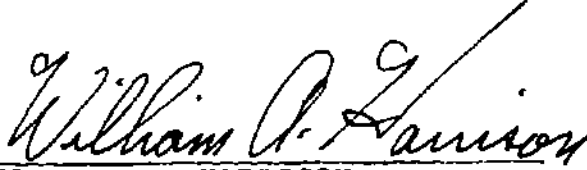
 4/23/85  
LAWRENCE J. FAULK, Chairman

  
WICK DUFFORD, Lawyer Member

  
RODNEY M. KERSLAKE, Member

  
NANCY BURNETT, Member

  
CYNTHIA SULLIVAN, Member

  
WILLIAM A. HARRISON  
Administrative Appeals Judge